



Office of the Attorney General
Washington, D. C. 20530

December 9, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

This responds to your letter of March 17, 2010, which asked the Department of Justice to consider implementing administratively certain enhanced civil liberties protections that were included in S. 1692, the USA PATRIOT Act Sunset Extension Act, as reported by the Senate Judiciary Committee.

In my letter of November 9, 2009, I expressed strong support on behalf of the Department for the bill as reported, which would reauthorize several important Foreign Intelligence Surveillance Act (FISA) authorities while enhancing protections for civil liberties and privacy in the exercise of these essential national security tools.

The bill would reauthorize section 206 of the USA PATRIOT Act, which provides authority for roving surveillance of targets who take steps that thwart FISA surveillance; section 215 of the USA PATRIOT Act, which provides authority to compel production of business records and other tangible things with the approval of the Foreign Intelligence Surveillance Court (the FISA Court); and section 6001 of the Intelligence Reform and Terrorism Prevention Act, which provides authority to target with FISA searches or surveillance non-United States persons who engage in international terrorist activities but are not necessarily associated with an identified terrorist group. Earlier this year, Congress acted to extend the expiring authorities until February 28, 2011. As that date approaches, I strongly urge that Congress again take action to ensure that these provisions remain in force.

Assuming these authorities are reauthorized, the Department has determined that many of the privacy and civil liberties provisions of S. 1692 can be implemented without legislation. Indeed, in a number of instances, we have already taken steps to do so. I am confident that these measures will enhance standards, oversight, and accountability, especially with respect to how information about U.S. persons is retained and disseminated, without sacrificing the operational effectiveness and flexibility needed to protect our citizens from terrorism and facilitate the collection of vital foreign intelligence and counterintelligence information.

National Security Letters

Your letter seeks our response regarding several matters related to National Security Letters (NSLs): notification to recipients of NSLs of their opportunity to contest the nondisclosure requirement; issuance of procedures related to the collection, use and storage of information obtained in response to NSLs; retention of a statement of specific facts that the information sought is relevant to an authorized investigation; and increased public reporting on the use of NSLs.

You will be pleased to know that as of February 2009, all NSLs are required to include a notice that informs recipients of the opportunity to contest the nondisclosure requirement through the government initiated judicial review. In most cases, this notice is automatically generated by the NSL subsystem. Domestic Investigations and Operations Guide (DIOG) § 11.9.3.E. The FBI also will ensure that in any case in which a recipient challenges a nondisclosure order, the recipient is notified when compliance with the order is no longer required. Thus far, there have been only four challenges to the non-disclosure requirement, and in two of the challenges, the FBI permitted the recipient to disclose the fact that an NSL was received. If and when the volume of such requests becomes sufficiently large that solutions beyond “one-off” notifications are required, the FBI will develop appropriate policies and procedures to notify the recipient when non-disclosure is no longer required.

I also am pleased to report that I approved Procedures for the Collection, Use and Storage of Information Derived from National Security Letters on October 1, 2010, and these procedures have been provided to the Judiciary and Intelligence Committees. The FBI’s current practice is consistent with the procedures and the FBI is working on formal policy to implement them. In addition, DOJ and ODNI will shortly complete work on a joint report to Congress on NSL “minimization” as required by the PATRIOT Reauthorization Act of 2005.

As to the information retained internally in connection with the issuance of NSLs, it is current policy for the FBI to retain a statement of specific facts showing that the information sought through NSLs is relevant to an authorized investigation. DIOG § 11.9.3.C.

The Department appreciates the desire of the Committee for enhanced public reporting on the use of NSLs. Accordingly, although the FBI cannot provide information regarding subcategories of NSLs in a public setting, it will continue to report publicly the aggregate numbers of NSLs on an annual basis and will evaluate whether any additional information can be publicly reported.

Section 215 Orders

Your letter also raises a number of matters related to section 215 orders. You seek assurances that the government will not rely on the conclusive presumption in section 215 and will present the FISA Court with a complete statement of facts sufficient to show relevance of the tangible things requested to an authorized investigation. It is current FBI practice to provide the Foreign Intelligence Surveillance Court with a complete statement of facts to support issuance of an order. The FBI is reviewing the DIOG to determine whether changes need to be made to reflect this practice. With respect to section 215 records that contain bookseller records, or are from a library and contain personally identifiable information about a patron of the library, we are prepared to require a statement of specific and articulable facts as would have been required under S. 1692, and to notify Congress should it become necessary to change that practice.

You ask the Department to issue policy guidance providing that certifications accompanying applications for section 215 nondisclosure orders must include an appropriately thorough statement of facts that sets forth the need for nondisclosure. I am pleased to report that this is current FBI practice, and the FBI is reviewing the DIOG to determine whether revisions should be made to reflect this practice.

You also ask the Department to institute guidelines to require court-approved minimization procedures for section 215 orders and pen register and trap and trace (PR/TT) devices. Minimization procedures are already required by statute in relation to section 215 orders. 50 USC § 1861(b)(2)(B). The proposal to extend this requirement to PR/TT orders is intended to apply only to certain intelligence collection activities. Procedures governing these operations are currently in effect, having been proposed by the government and approved by the FISA Court.

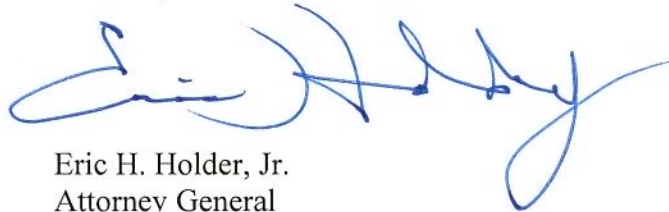
Finally, you ask the Department to consider providing an annual unclassified report on the use of FISA authorities and the impact on privacy of United States persons. I believe that providing greater transparency regarding the U.S. government's exercise of FISA authorities is an important objective, and will show the care taken by officials to implement and comply with constitutional and statutory requirements to protect the privacy of United States persons. Although the Department has concerns that there may be little additional information that can be provided in an unclassified format and that such unclassified information could be unintentionally misleading, we are prepared to work with the committee and our partners in the Intelligence Community to determine whether there is a way to overcome these difficulties and make additional information publicly available regarding the use of these authorities.

Taken together, I believe these measures will advance the goals of S. 1692 by enhancing the privacy and civil liberties our citizens enjoy without compromising our ability to keep our nation safe and secure.

The Honorable Patrick J. Leahy
Page Four

I hope this information is helpful. The Department stands ready to work with Congress to ensure that the expiring FISA authorities are reauthorized in a timely way.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric H. Holder, Jr.", with a large, stylized flourish at the end.

Eric H. Holder, Jr.
Attorney General

cc: Honorable Jeff Sessions
Ranking Republican Member